DOCUMENT RESUME

ED 139 081 EA 009 492

AUTHOR Munro, Robert J.
TITLE The Scope of Collective Bargaining and Arbitration for Tenure of Public School Teachers: The New York Experience.
PUB DATE 76
NOTE 30p.

EDRS PRICE MF-$0.83 HC-$2.06 Plus Postage.
DESCRIPTORS *Arbitration; *Collective Bargaining; *Court Litigation; Elementary Secondary Education; Labor Legislation; Negotiation Impasses; *State Legislation; Teachers; *Tenure; Unions
IDENTIFIERS *New York; Taylor Law

ABSTRACT

This paper surveys the legal aspects of tenure and arbitration under the Taylor Law, New York State's major statute governing collective bargaining for public employees (including teachers). The law outlaws teachers' strikes, but provides three methods of dispute resolution between employees and school districts (mediation, fact-finding, and both compulsory and voluntary arbitration). The teacher unions seek to negotiate how tenure will be granted, by what criteria, and at what stage in a teacher's career, according to one of these three methods. It is the public policy of the state of New York to encourage voluntary resolution of labor disputes involving public employees through one of these forums. The author describes both the legislation and the court decisions that define the scope of bargaining and arbitration. He concludes that the legal environment in New York offers no major obstacles to negotiating aspects of tenure. (Author/DS)

****
* Documents acquired by ERIC include many informal unpublished *
* materials not available from other sources. ERIC makes every effort *
* to obtain the best copy available. Nevertheless, items of marginal *
* reproducibility are often encountered and this affects the quality *
* of the microfiche and hardcopy reproductions ERIC makes available *
* via the ERIC Document Reproduction Service (EDRS). EDRS is not *
* responsible for the quality of the original document. Reproductions *
* supplied by EDRS are the best that can be made from the original. *
****

ED139081

U S DEPARTMENT OF HEALTH, EDUCATION & WELFARE NATIONAL INSTITUTE OF EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

SCOPE OF INTEREST NOTICE

The ERIC Facility has assigned this document for processing to: EA SP

In our judgement, this document is also of interest to the clearinghouses noted to the right. Indexing should reflect their special points of view.

THE SCOPE OF COLLECTIVE BARGAINING AND ARBITRATION FOR TENURE OF PUBLIC SCHOOL TEACHERS: THE NEW YORK EXPERIENCE

by

Robert J. Munro

EA 009 492

TABLE OF CONTENTS

INTRODUCTION .....p. 1

STATUTORY BACKGROUND .....p. 4

SCOPE OF BARGAINING AND ARBITRATION .....p. 10

CONCLUSION .....p. 24

BIBLIOGRAPHY .....p. 25

INTRODUCTION

In New York, as in most other states where collective bargaining has been mandated for public employees, the strike remains illegal.[1] As an alternative to the use of strikes many states provide a procedure to help the parties at impasse reach settlement. In New York, the impasse procedure calls for mediation followed, if necessary, by fact finding with recommendations.[2] The fact finder's recommendations are not binding on the parties because it was feared that to make them binding might deter meaningful bargaining. It was hoped, however, that the recommendations, even if not accepted in full, would be the basis for a settlement.[3]

The purpose of this paper is to show the scope of collective bargaining and arbitration for tenure that has developed in New York over the years. It has only been recently that school teachers, as public employees, in New York could collectively bargain or arbitrate for tenure rights as a "term and condition of employment."[4] In this review the author will examine the statutory background behind the right of collective bargaining for tenure by teachers, in addition to the examining of recent case law on the same subject. Before the author proceeds to this level of analysis, however, it will greatly aid the reader if he understands certain basic concepts involved in tenure negotiations by school teachers.

---

[1] Public Employees' Fair Employment Act of the Civil Service Law (The Taylor Act), N.Y.C.L.S. art. XIV, §210 (1975).

[2] Id. §209.

[3] Doering, Impasse Issues in Teacher Disputes Submitted to Fact Finding in New York, 27 Arb. J. 1 (March 1972).

[4] The Taylor Act, §201(4).

The teacher unions are not only interested in economic advances, but they are also equally interested in securing protection against arbitrary, capricious or discriminatory terminations and suspensions of employees. These unions are interested in protecting employees against unreasonable work requirements and other adverse conditions. Furthermore, to assure adherence by the rank and file to the protections won, most teacher unions demand and win the right to complain about any actions of the employer and, as the final step of the grievance procedure, to present the dispute to an arbitrator for final and binding award.[5]

The teacher unions seek to negotiate how tenure shall be granted, by what criteria, and at what stage in a teacher's career by using one of the following four methods: mediation, fact-finding, compulsory arbitration, or voluntary arbitration. Since each method can be used by a teacher union for resolving tenure disputes in New York, a brief explanation on how each one works is in order.

The first method is mediation. Mediation should not be confused with other types of third-party intervention, such as fact-finding. The function of the mediator is to help the parties reach their own agreement. It is not his job to make an agreement for them. The theory of mediation is that an impartial outsider who brings a fresh perspective to the dispute can be effective in moving the parties toward agreement. A mediator helps to achieve an agreement by surmounting problems of communication, by overcoming hostility and suspicion and by evaluating proposals and positions realistically.

The second method is fact-finding. If mediation fails to produce a

---

[5]Benewitz, Are Tenure and Collective Bargaining Compatible?, 67 Practicing Law Institute 168 (1974).

settlement, the typical intervention procedure calls for fact-finding or nonbinding arbitration. Whereas mediation is informal, fact-finding usually is a structured procedure involving a hearing, presentation of testimony, submission of documentary evidence, oral argument (and sometimes briefs), and other characteristics of a judicial proceeding. The fact-finder is expected to make findings of fact based upon the evidence and to submit recommendations reflecting a considered judgment as to what the terms of a fair settlement are.

The next method to be considered is compulsory arbitration. This is a system under which the parties must submit their dispute to the arbitral process and must accept the award as final and binding. This type of arbitration might better be called "legislated" arbitration because its essential characteristic is that it is a mandatory legal obligation, totally lacking in any aspects of voluntarism.

Contrasted with compulsory arbitration is voluntary arbitration. In compulsory arbitration the parties are required to submit their dispute to the artibral process. On the other hand, in voluntary arbitration, the parties may or may not take their dispute to arbitration. The choice is the parties; the choice is not mandated by law.[6]

With these concepts firmly in mind, the focus of this paper shall now be turned upon the statutory background behind the right of collective bargaining for tenure by teachers. As we shall soon see, this statutory background is comprehensive in its approach.

---

[6] Wollett, Labor Relations and Negotiations in the Public Schools, 83 Practicing Law Institute 57-8 (1976).

STATUTORY BACKGROUND

The New York Statute[7] can be considered comprehensive in its reach over the teacher unions when they attempt to negotiate tenure rights for the teachers because not only does the statute give the traditional judicial remedies to the local school boards but the statute also provides administrative remedies against the teacher organizations and/or individual teachers.

For example, under the New York Statute, the school board must, in the case of a strike, initiate proceedings against the organization before the Public Employment Relations Board for the purpose of causing the teachers organization to lose its right to have dues deducted from the teachers' salary checks. The New York Statute, in addition, provides that in fixing the duration of the dues-deduction forfeiture, the Public Employment Relations Board shall consider, among other things, whether the employer has "engaged in such acts of extreme provocation as to detract from the responsibility of the employee organization for the strike." A public employee who engages in or causes, instigates, encourages, or condones a strike is "subject to removal or other disciplinary action provided by law for misconduct." Presumably this includes initiating formal dismissal proceedings against tenured teachers.[8]

The New York Statute also requires the public employer to impose certain penalties. The chief executive officer of the government involved, e.g. the superintendent of schools, must investigate situations of apparent strike participation and determine whether the employee engaged in such conduct. An employee determined to have violated the strike prohibition shall

---

[7] The Taylor Act, §§ 200-214.

[8] Id., §210.

have deducted from his compensation an amount equal to twice his daily rate of pay for each day or part thereof that he was in violation, credit being given for amounts already withheld for the days he was on strike. Moreover, the employee "shall be on probation for a term of one year following such determination during which period he shall serve without tenure."[9]

In examining the key areas of the statute, it becomes apparent that the New York Legislature (hereafter referred to as Legislature) has tried to strike a balance between the need of the teachers for job security with tenure and the need of the local school boards to be able to discharge a poorly performing or incompetent teacher. The Legislature first decided that the term "terms and conditions of employment" meant salaries, wages, hours and other terms and conditions of employment.[10] Having laid this ground work, the Legislature decided that public employers would be empowered to recognize employee organizations for the purpose of negotiating collectively in the determination of, and administration of grievances arising under the terms and conditions of employment of their public employees. In addition, the public employers could negotiate and enter into written agreements with such employee organizations in determining such terms and conditions of employment.[11]

---

[9] Id. The constitutionality of the "double deduction" was upheld in Zeluck v. Board of Education, 62 Misc. 2d 274, 307 N.Y.S.2d 329 (1970), aff'd 36 App. Div. 2d 615, 319 N.Y.S.2d 409 (1971). The court ruled that the deductions were not bills of attainder because of the availability of procedures pursuant to which they might be challenged. See Benewitz, supra at 68-9.

[10] Id., §201(4).

[11] Id., §204(1). This section clearly gives the local school boards the power and authority to enter into tenure agreements with the various teacher organizations.

Next the Legislature created in the state department of civil service a board that was to be known as the public employment relations board. This board consists of three members appointed by the governor, by and with the advice and consent of the senate, from persons representative of the public. Each board member is appointed for a term of six years. The governor designates one member to serve as chairman of the board until the expiration of that board member's term.[12]

One of the powers and functions given to the board by the Legislature is the power to establish procedures for the prevention of improper employer and employee organization practices. When there are certain claimed violations of the statute, these procedures need provide only for the entry of an order directing the public employer or employee organization to negotiate in good faith.[13] Consequently, the Public Employment Relations Board can be considered as the "watchdog" over the tenure negotiations that take place between the teachers' unions and the local school boards.

The Legislature was quite specific when it decided the manner for resolving disputes that arose in the course of collective negotiations. The Legislature first stated that an impass may be deemed to exist if the parties have failed to achieve agreement at least one hundred and twenty days prior to the end of the fiscal year of the public employer.[14]

Public employers were empowered to enter into written agreements with recognized or certified employee organizations setting forth the procedures to be invoked in the event of disputes which reach an impasse in the course of the collective negotiations. Such agreements, said the Legislature, may include the undertaking by each party of submitting unresolved issues to impartial arbitration. In the absence or upon the failure of such procedures,

---

[12] Id. §205(1).

[13] Id. §205(5)(d).

[14] Id. §209(1).

public employers and employee organizations may request the board (i.e. the Public Employment Relations Board, hereafter referred to as board) to render assistance or the board may render such assistance on its own motion.[15]

On request of either party or upon the board's own motion, and in the event that the board determines that an impasse exists in collective negotiations between employee organizations and a public employer as to the conditions of employment for the public employees, the board can render assistance in one of the following ways:[16]

1. In order to assist the parties in effecting a voluntary resolution to the dispute, the board can appoint a mediator or mediators representative of the public from a list of qualified persons maintained by the board.

2. If the impasse continues, the baord can appoint a fact-finding board of not more than three members, each representative of the public, from a list of qualified persons maintained by the board. This fact-finding board can have the power to make public recommendations for the resolution of the dispute.

3. If the dispute is not resolved in at least eighty days prior to the end of the fiscal year of the public employer or by such other date determined by the board to be appropriate, the fact-finding board can (a) immediately transmit its findings of fact and recommendations for resolution of the dispute to the chief executive officer of the government involved and to the employee organization involved, or (b) assist the parties in effecting a voluntary resolution of the dispute, or (c) make within five days of such transmission public its findings and recommendations.

4. In the event that the findings of fact and recommendations are made public by a fact-finding board appointed by the board and the impasse continues, the public employment relations board has the power to take whatever steps it deems appropriate in resolving the dispute including (a) the making of recommendations after due consideration has been given to the findings of fact and recommendations made first by the fact-finding board, but no further fact-finding board is appointed, and (b) the assisting in the effort to provide for voluntary arbitration, when the parties have so requested such action.

---

[15] Id. § 209(2).

[16] Id. § 209(3)(a-e).

5. Should either the public employer or the employee organization not accept in whole or in part the recommendations of the fact-finding board, there are two options open. The first option entails the chief executive officer of the government involved, within ten days after receipt of the findings of fact and recommendations of the fact-finding board, submitting to the legislative body of the government involved a copy of the findings of fact and recommendations of the fact-finding board, together with his recommendations for settling the dispute. The second option is for the employee organization to submit to such a legislative body its recommendations for settling the dispute.[17]

The public policy of prohibiting strikes by public employees was continued in §210 where the statute reads that "no public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike."[18]

Finally, since the public employees such as the teachers were prohibited from striking, the Legislature mandated that orders issued by the board be deemed to be final against all parties to its proceedings and

---

[17]Two other methods of resolving the dispute are provided for in §209(3)(e), but these two methods are made inapplicable by §209(f) to any dispute where the public empioyer is a school district. In lieu of these two mehtods for reolving disputes between public employers (i.e. local school districts) and public employees (i.e. teachers), the Legislature has provided two alternative means.

1. The board may afford the parties an opportunity to explain their positions with respect to the report of the fact-finding board at a meeting at which the legislative body, or a duly authorized committee thereof, may be present.

2. Thereafter, the legislative body may take such action as is necessary and appropriate to reach an agreement. The board may provide such assistance as may be appropriate.

See §209(3)(f).

[18]The Taylor Act, §210(1).

persons who have had an opportunity to be parties to its proceedings, unless the order is reversed or modified in any proceedings for its enforcement or by judicial review. Such orders can be both reviewable and enforceable in a special proceeding by the supreme court.[19]

These then are the prinipal parts of the Taylor Act as they relate to tenure disputes between school teachers and school boards. The Act was passed by the New York Legislature in hopes that a peaceful and effective means of resolving disputes between public employees and employers could be achieved. In fact one of the main aims of the Taylor Act is to assure that the efficiency of teachers and other public employees will be promoted by securing their right to organize.[20] But one must consider the case law interpreting the Taylor Act provisions and applying these provisions to various fact situations in order to better understand the actual scope of collective bargaining and arbitration for tenure between the teacher organizations and the local school boards.

[19] Id., §213(a).

[20] Board of Education v. Helsby, 37 App. Div. 2d 493, 326 N.Y.S.2d 452 (1971), aff'd 32 N.Y.2d 660, 343 N.Y.S.2d 131, 295 N.E.2d 797 (1973).

SCOPE OF BARGAINING AND ARBITRATION

When considering the scope of collective bargaining and arbitration as they relate to tenure for teachers, one must realize that the school boards in New York have constantly claimed that tenure is a non-bargainable item. The basic premise which underlies many of the school board claims of non-bargainability is that, absent a statutory provision expressly authorizing the school board to provide for a particular term or condition of employment, it may not legally agree to do so. This premise was relied upon by the school board and categorically rejected by the New York Court of Appeals in Board of Education of Union Free School District No. 3 of Town of Huntington v. Associated Teachers of Huntington, Inc.[21]

In Huntington the Court held that the obligation to negotiate under New York's public employee negotiations statute is broad, unqualified by implication, and limited only to the extent that some other statutory provision explicitly prohibits a school board from making an agreement as to a particular term or condition of employment. The court stated in its opinion:

> Public employers must be presumed to possess the broad powers needed to negotiate with employees as to all terms and conditions of employment.... In the absence of an express legislative restriction against bargaining for that term of an employment contract between a public employer and its employees, the authority to provide for such term resides in the school board under the broad powers and duties delegated by the statutes.[22]

The Huntington case also involved the validity of five provisions which had been included in a collective negotiations agreement between the associa-

---

[21] 331 N.Y.S.2d 17, 30 N.Y.2d 122, 282 N.E.2d 109 (1972).

[22] Id. at 23.

tion and the school board. The fifth provision dealing with the arbitration of disciplinary actions taken against tenure teachers concerns us here. The threshhold question before the court was whether the disputed item constituted a "term or condition of employment." The court had little difficulty answering this question affirmatively:

> It is manifest that each of the provisions here challenged constitutes a term or condition of employment. ... This brings us to the grievance provision. It assures teachers with tenure that no disciplinary action will be taken against them without just cause and that any dispute as to the existence of such cause may be submitted to arbitration. It is a provision commonly found in collective bargaining agreements in the private and public sectors and carries out Federal and State policy favoring arbitration as a means of resolving labor disputes. ... In sum, each of the provisions under attack clearly relates to a term or condition of employment....[23]

A year earlier in July, 1971, a somewhat similar matter was before the Public Employment Relations Board. In this case, the board ruled that the New Rochelle School Board was not required to negotiate over budget reductions which resulted in the elimination of departments and the termination of about 140 positions, causing the layoff or dismissal of some 20 percent of the professional staff, including tenured teachers.[24] The doctrine which emerged from this case--the so-called New Rochelle doctrine--holds that a school board is not required to negotiate about the budget decision (although it may do so) but it is required to negotiate about the <u>effects</u> of the decision, including, presumably, such matters as order of recall, severance pays, the firing of tenured teachers etc. The basis for the board's holding was the following:

---

[23] Id.

[24] Wollett, supra at 52. See also City School District of New Rochelle and New Rochelle Federation of Teachers, 4 N.Y. PERB, [4-3060] (1971).

> Decisions of a public employer with respect to carrying out of its mission...are matters that a public employer should not be compelled to negotiate with its employees. Here there must be noted a substantial difference between private employers and public employers, for the latter owe a very special obligation to the public not owed by private employers....[25]

The court continued by saying:

> An employee organization is not precluded from seeking negotiations concerning such decisions on a permissive basis. Further, it would seem most desirable for a public employer to meet and discuss with a representative of its employees concerning such decisions, particularly where, as here, the employees are professionals and their opinions on the education process and standards should be of value to the employer.[26]

The New York Public Employment Relations Board has determined that the failure of a public employer to continue, during negotiations for a new agreement, terms and conditions of employment established by an expired agreement or by past practices constitutes a refusal to negotiate in good faith.[27] The employer, according to this decision, must maintain the status quo unless and until either (a) the union agrees to the discontinuance of the present agreement or (b) the statutory impasse procedures, including a legislative hearing, have been exhausted. Such an interpretation of the obligation to negotiate in good faith effectively prevents a public employer, even where it has given the union notice and has bargained to an impasse, from unilaterally modifying matters within the mandatory scope of bargaining.

---

[25] Id. at 52.

[26] Id. at 53.

[27] Id. at 54. See also Matter of Triborough Bridge and Tunnel Authority, 5 N.Y. PERB [3064] (1972).

Many of the state statutes that categorically prohibit all public employee strikes have to date uniformly been upheld against attack on constitutional grounds. For example, the New York Court of Appeals, in sustaining the Taylor Act's ban on public employee strikes in the case of City of New York v. DeLury,[28] held that a state has the power, so far as the due process argument is concerned, to prohibit any strike if the prohibition is reasonably calculated to achieve a valid state policy. The court then pointed out that the state has a legitimate interest in preserving the ability of legislative bodies to establish priorities among governmental services and budgetary allocations free from the coercive effect of strikes by public employees. The legitimacy of this interest is grounded, said the court, in the fact that these choices, in a democratic legislative process, should result from determinations by the electorates representatives, and not from strike pressures by means of which some public employees obtain gains "wholly disproportionate to the services rendered by them and at the expense of the public and other employees."[29] Therefore, the court concluded that such a prohibition does not offend concepts of subtantive due process.

The New York court also rejected the equal protection argument in the same case. The question, where two classes of employees (i.e. public employees and private employees) are treated differently, is whether there is a reasonable basis for the classification. The court set forth certain factual differences between private employment and public employment which In its judgment furnished "reasonable justification for disparate treatment of public and private employees vis-a-vis the right to strike."[30]

---

[28] 23 N.Y.2d 175, 295 N.Y.S.2d 901, 243 N.W.2d 128 (1968).

[29] Id. at 183.

[30] Id. at 186.

Since the New York Legislature has explicitly mandated that strikes are not to be allowed, the New York courts have had no trouble in holding that this prohibition is comprehensive and unbending in its effect. No question exists with regard to the constitutionality of the Taylor Act insofar as it prohibits strikes by public employees.[31] One New York Court has even gone so far as to say that the alleged failure of the school board to bargain in good faith will not justify an illegal strike action.[32] The Kuntz case also held that the contention that Civil Service Law §210 and §211 were invalid or unconstitutional would not justify such an illegal strike action by the teachers.[33]

The prohibition of strikes by teachers means the strike can not be used as a weapon in tenur negotiations. But could it be argued that a strike is essential to the right of association? Such an argument was made in Zeluck v. Board of Education[34] where a New York Appeals Court said that the ability to strike is not essential to the right of association and it is subordinate to the right of the state to prohibit such activity. Consequently, Section 210 of the Taylor Law does not infringe upon the teacher's rights of

---

[31] Board of Education v. Shanker, 54 Misc. 2d 941, 283 N.Y.S.2d 548 (1967), aff'd 29 App. Div. 2d 634, 284 N.Y.S.2d 453 (1967).

[32] Kuntz v. Newburgh Teachers Association, 75 Misc. 2d 389, 347 N.Y.S.2d 905 (1973).

[33] Id.

[34] 62 Misc. 2d 274, 307 N.Y.S.2d 329 (1970), aff'd 36 App. Div. 2d 615, 319 N.Y.S.2d 409 (1971).

free association and speech.[35] In addition, the right of association is not made meaningless by the fact that the school board is both negotiator and ultimate arbiter of disputes arising out of negotiations, in view of the procedures set forth in the Taylor Law to bring about the settlement of the disputes.[36]

Since the strike has been taken away as a pressuring device for tenure rights, the New York Legislature has been liberal in its approach in allowing alternative means for New York teachers to use when negotiating and bargaining for tenure rights. In fact, it is the public policy of the State of New York to include, rather than exclude, all terms and conditions of employment in negotiations and grievance procedures, and employers presumptively have the broad powers to do so, absent express statutory prohibitions.[37] However, the Taylor Law cannot be read as granting public employers or employee organizations the right to agree and bind themselves to terms and conditions of employment not otherwise authorized by law.[38]

What method then does New York want the teacher unions to follow when negotiating for tenure rights for the individual teachers? Well, first of all a school district has the power to contract to arbitrate disputes,[39] but a party may not be compelled to arbitrate in the absence of an agreement

---

[35] Id.

[36] Id.

[37] Currie v. Bixby, 40 App. Div. 2d 341, 340 N.Y.S.2d 73 (1973).

[38] Board of Education v. Associated Teachers of Huntington, Inc., 62 Misc. 2d 906, 310 N.Y.S.2d 929 (1970), modified on other grounds 36 App. Div. 2d 753, 319 N.Y.S.2d 469 (1971), modified on other grounds 30 N.Y.2d 122, 331 N.Y.S.2d 17, 282 N.E.2d 109 (1972).

[39] Board of Education v. Chautauqua Central School Teachers Association, 410 App. Div. 2d 47, 341 N.Y.S.2d 690 (1973).

to do so.[40] Moreover, contracts concerning employment and settlement of disputes arising from employment or concerning any violations of contracts are to be settled by arbitration in New York in order to maintain a uniform system for collective bargaining agreements.[41] From all of this a definite pattern develops in the New York courts--a pattern emphasizing arbitration between teacher unions and school boards when a dispute arises over tenure rights for teachers.

Since the New York Courts have taken this pro-arbitration attitude when a tenure dispute develops, the courts have tried to limit the coverage of this attitude to regular school teachers. With regard to negotiating units and employees, the New York Legislature did not intend to include within the scope of the term "employees" a person employed in a summer school program whose nature does not justify the application of the Taylor Law.[42]

Despite this limiting language one should always remember that it is the public policy of the State of New York to encourage voluntary resolutions of labor disputes involving public employees through forums such as arbitration,[43] and that it is always properly within the scope of judicial review whether the arbitrators acted in excess of their statutory grant of authority or in disregard of the standard prescribed by the legislature.[44]

---

[40] Reese v. Lombard, 366 N.Y.S.2d 493 (1975).

[41] Romulus Central School Faculty Association v. Romulus Central School District Board of Education, 77 Misc. 2d 1073, 355 N.Y.S.2d 304 (1974).

[42] Helsby v. Board of Education, 60 Misc. 2d 892, 304 N.Y.S.2d 236 (1969).

[43] Board of Education v. Auburn Teachers Association, 371 N.Y.S.2d 201 (1975).

[44] Caso v. Coffey, 83 Misc. 2d 614, 372 N.Y.S.2d 892 (1975).

With the State of New York adopting a pro-arbitration public policy as the means of settling tenure disputes between public school teachers and the local school boards, it would only seem logical that the Legislature would endow the Public Employment Relations Board with broad jurisdictional qualities so that the board would be legally empowered to settle such disputes. For instance in Board of Education v. Lakeland Federation of Teachers[45] a New York Court held that disputes over the inclusion in the bargaining unit of certain teaching positions that were originally excluded from the bargaining unit, a dispute that involved a question of representation, was determinable by the Public Employment Relations Board pursuant to Civil Service Law §200, §205, §207, and that the inclusion item was not an arbitrable dispute arising out of the labor agreement absent an express provision in such an agreement for the arbitration of representation disputes.

The New York Courts have been quite lenient in setting the outer boundaries of the Public Employment Relations Board's jurisdiction over school-teacher disputes over tenure. It was held that the board had jurisdiction to factually consider whether the dismissal of probationary teachers was because of their membership in and activities for support of an employee's organization.[46] The board also had jurisdiction to consider a charge of an improper labor practice based on the dismissal of a non-tenured teacher, where the dismissal was allegedly committed solely as a retaliation for the teacher's activities as a member of a teachers' association.[47] Besides handling

---

[45]74 Misc. 2d 430, 345 N.Y.S.2d 297 (1973).

[46]Board of Education v. Helsby, 37 App. Div. 2d 493, 326 N.Y.S.2d 452 (1971), aff'd 32 N.Y.2d 660, 343 N.Y.S.2d 131, 295 N.E.2d 797 (1973).

[47]Brentwood Board of Education v. Helsby, 68 Misc. 2d 730, 327 N.Y.S.2d 881 (1971).

the problems that arise over individual teacher disputes, the board will hear matters being discussed between the school board and teacher organizations such as tenure rights because the Public Employment Relations Board has the requisite authority to determine the illegality of subject matter of negotiations between the school board and the teachers' association--an authority incident to its unquestioned power to determine whether the contending parties have failed to negotiate in good faith.[48]

All of this is not to say that the board lacks any limitations on its authority to settle tenure disputes between teachers and school boards. Such limitations are quite definite and the New York courts have not been hesistant in delineating them. For example the Public Employment Relations Board had no authority to hear and determine a complaint by a probationary teacher that she was discharged because of organizational activities and to issue an order directing the board of education to reinstate her.[49] It was also found that the board had no power of jurisdiction concerning a summer school teachers association since the unit was not comprised of any employees at the time it filed its petition.[50] Furthermore, the board acted in excess of its jurisdiction in adopting regulations permitting it to hear and determine complaints as to alleged reprisals by public employers, and it had no authority to order the respondent board of education to reinstate the probationary teacher.[51]

---

[48]Farrigan v. Helsby, 42 App. Div. 2d 265, 346 N.Y.S.2d 39 (1973).

[49]Helsby v. Board of Education, 59 Misc. 2d 943, 301 N.Y.S.2d 383 (1969), aff'd 34 App. Div. 2d 361, 312 N.Y.S.2d 355 (1970).

[50]Helsby v. Board of Education, 60 Misc. 2d 892, 304 N.Y.S.2d 236 (1969).

[51]Helsby v. Board of Education, 59 Misc. 2d 943, 301 N.Y.S.2d 383 (1969), aff'd 34 App. Div. 2d 361, 312 N.Y.S.2d 355 (1970).

In passing it is interesting to note that the New York courts have been faced with some very difficult and complex problems concerning the proper relationship to be established between the board, the teacher unions, and the local school districts. Since the New York Legislature has place great emphasis on the board (i.e. PERB) the courts in the state seem to have "bent over backwards" so to speak in finding in favor of the board's position when the board is challenged by the teacher unions. In North Bellmore Teachers Association v. Board of Education[52] the court held that the board did not violate the law by acting on the fact-finder's findings and recommendations without notifying the union officials of such action in advance and in calling a legislative hearing as the Taylor Act contemplates such action. The court also said that the Taylor Act did not specify any waiting period or establish any ban on the publication of a fact-finder's findings and recommendations. Two years later it was decreed that an order of the board suspending the teachers' bargaining representative for violating the antistrike statute and simultaneously ordering the public employer to cease and desist from refusing to bargain in good faith was not violative of the equal protection clause by virtue of the harsher penalty imposed on the bargaining representative because the difference in penalties could be attributed to a reasonable classification between the public employer and public employee.[53]

---

[52]68 Misc. 2d 238, 326 N.Y.S.2d 571 (1971).

[53]Greenburgh No.11 Federation of Teachers v. Helsby, 41 App. Div. 2d 329, 342 N.Y.S.2d 588 (1973).

The establishment of the Public Employment Relations Board and the granting it of broad and sweeping powers is just one of several ways the New York Legislature has decided to handle tenure disputes in that state. Another remedy open to aggrieved teachers who have lost tenure or their job is the courts. For instance, in Port Jervis City School District v. New York State Public Employment Relations Board[54] it was held that a non-tenure teacher may not be dismissed for the sole reason of his leadership in the activities of a teachers' association. In this case the teacher had to turn to the courts after he was denied relief by the board.

It should be noted that the teacher in Port Jervis was a non-tenured teacher. The New York courts have fashioned different rules for probationary teachers who have come under fire from the local school board. A dispute over tenure rights of a teacher who was about to complete his probationary period was arbitrable, said a New York court, notwithstanding the claim that arbitration would operate to circumvent or deprive the board of education or the district superintendent from tenure procedures as set out in the statutes.[55] In fact this rule was especially true where the collective bargaining agreement specifically provided for arbitration in the event of a claim by any teacher or group of teachers based upon any event or condition affecting their welfare and/or terms and conditions of employment.[56] In addition a board of education may terminate services of a probationary teacher without a hearing and without giving a reason therefor, subject to the the provisions of the Taylor Act and arbitration agreements, if any.[57]

---

[54] 68 Misc. 2d 1065, 328 N.Y.S.2d 760 (1972).

[55] Romulus Central School Faculty Association v. Romulus Central School District Board of Education, 77 Misc. 2d 1073, 355 N.Y.S.2d 304 (1974).

[56] Id.

[57] Lezette, v. Board of Education, 35 N.Y.2d 272, 360 N.Y.S.2d 869, 319 N.E. 2d 189 (1974).

It is apparent then that the principle which governs the discharge of probationary employees under the Civil Service Law is the standard to be employed in effecting the discharge of tenured teachers who have been lawfully reduced to Taylor Act probationary status.[58] As a result it would seem that the teacher unions must include the teachers who are presently on a probationary period within its tenure proposals which it will submit to the local school board for negotiation. To leave these teachers out of the negotiation process would be to effectively cut out a discernable category of public employees from the protections of the Taylor Act and the protections that can be afforded by a public employee union.

Although the New York courts have agreed to broaden the category of teachers covered by the tenure negotiations, the same courts have been hostile to the idea of reinstating teachers with full tenure privileges who have had their positions abolished by school board action. The courts reason that if a poistion is abolished then the tenure rights of the person who held that particular position ought to be abolished simultaneously. The tenure right and the position are interrelated. If one goes, so does the other. For instance, in Carmel Central School District v. Carmel Teachers Association[59] the court held that the school board which had abolished certain positions within the school district was not required to submit to arbitration with the teacher's association on the issue of abolition, because the abolition was pursuant to a grievance procedure contained in

---

[58] Tuller v. Central School District, 73 Misc. 2d 1028, 343 N.Y.S.2d 467 (1973).

[59] 76 Misc. 2d 63, 348 N.Y.S.2d 665 (1973).

the teacher's collective bargaining agreement whereby the creation and abolition of positions within the school district was function solely of the board of education and was not a term or condition of employment. Consider also a case that held in an action by a petitioning teacher who sought her reinstatement as a department chairman and tenure in her position, the petition would be denied because an agreement was entered into by the board of education whereby tenure as a department chairman would be granted if the services in such a position constituted 40 percent of the employment. In this case, the teacher failed to prove that she came within such a requirement of the agreement.[60]

But could it be argued that the power of the school board to abolish the position of a tenured teacher is itself negotiable under the Taylor Act? Even though the general subject of work rules for public employees involves a condition of employment and, as such, is mandatorily negotiable[61] it must be remembered that the public employer's power to bargain collectively is limited to such matters as are classfiable as terms or conditions of employment.[62] Consequently, the public employer may not lawfully bind itself in a collective bargaining agreement with respect to items not so classifiable.[63] Thus the question boils down to whether the court will view the power of the school board to abolish positions held by a tenured teacher to be a "term or condition of employment." Although the New York courts have not directly faced this question, there are a few case decisions that shed some light on how the courts might react to this problem when faced with it for the first time.

---

[60] Vamvakis v. Board of Education, 61 Misc. 2d 379, 305 N.Y.S.2d 544 (1969).

[61] Albany v. Helsby, 48 App. Div. 2d 998, 370 N.Y.S.2d 215 (1975).

[62] Schwab v. Bowen, 363 N.Y.S.2d 434 (1975).

[63] Id.

In Board of Education v. Yonkers Federation of Teachers[64] the court held that a provision in a collective bargaining agreement between a teachers' organization and the board of education regarding salaries was effective and subject to arbitration even if the funds necessary to the implement of the provision were not appropriated by the city council. In an earlier case, the Supreme Court of Dutchess County, New York said a collective bargaining agreement between the teachers' organization and the board of education did not continue after it expired while the parties were negotiating for a new agreement and thus the agreement did not cover a tenure grievance arising more than six months after the contract expired.[65] From these two agreement cases one can deduce the fact that the New York courts generally favor agreements between school boards and teacher unions. Consequently, these courts will be favorably inclined to include a wide range of subject matter under the heading of "terms and conditions of employment," so that a compromise reached between the school boards and tenure unions over what tenure rights will be forfeited and what tenure rights will be maintained when a position is abolished could be appropriately included in an agreement. Based on this line of case analysis it would seem that the New York courts will rule favorably when they must eventually decide this question.

[64] 373 N.Y.S.2d 164 (1975).

[65] Board of Education v. Poughkeepsie Public School Teachers Association, 75 Misc. 2d 931, 349 N.Y.S.2d 47 (1973).

CONCLUSION

The legal environment offers no major obstacles to negotiating aspects of tenure. Most state public-employment-relations acts typically permit negotiations with respect to salaries, wages, hours, and other terms and conditions of employment. There are, however, no decisions that have squarely faced the issued of whether or to what extent a tenure system might be negotiated. It is fair to generalize that matters relating to job security have traditionally been considered within the definition of "terms and conditions of employment" under most collective bargaining laws. Generally speaking, the scope of negotiation has been liberally construed to include in the bargaining process a variety of matters of logical concern to affected employees.[66]

Some commentators feel that unions will not only win the right to have reasons for termination of untenured teachers presented to them, but that these unions will also have the right to grieve and arbitrate the validity of the school board decision denying tenure to the untenured teacher.[67] Presently the teacher unions do not have either of these two rights. Whether these commentators have accurately portrayed the advancing trend in tenure negotiations between school boards and teacher unions is yet to be seen. One thing is certain though. The area of labor negotiations for tenure righs will rapidly develop in the coming years.

---

[66] Menard, May Tenure Rights of Faculty be Bargained Away?, 2 J. of College and Univ. L. 260 (Spring 1975).

[67] Benewitz, supra at 170.

BIBLIOGRAPHY

Acting Superintendent of Schools of Liverpool Central School District v. United Liverpool Faculty Association, 385 N.Y.S.2d 879 (1976).

Albany v. Helsby, 48 App. Div. 2d 998, 370 N.Y.S.2d 215 (1975).

Benewitz, Are Tenure and Collective Bargaining Compatible?, 67 Practicing Law Institute 167 (1974).

Board of Education v. Associated Teachers of Huntington, Inc. 62 Misc. 2d 906, 310 N.Y.S.2d 929 (1970), modified on other grounds 36 App. Div. 2d 753, 319 N.Y.S.2d 469 (1971), modified on other grounds 30 N.Y.2d 122, 331 N.Y.S.2d 17, 282 N.E.2d 109 (1972).

Board of Education v. Auburn Teachers Association, 371 N.Y.S.2d 201 (1975).

Board of Education, Bellmore-Merrick Central High School District, Nassau County v. Bellmore-Merrick United Secondary Teachers, Inc. 383 N.Y.S.2d 242, 39 N.Y.2d 167, 347 N.E.2d 603 (1976).

Board of Education v. Chautauqua Central School Teachers Association, 410 App. Div. 2d 47, 341 N.Y.S.2d 690 (1973).

Board of Education v. Helsby, 37 App. Div. 2d 493, 326 N.Y.S.2d 452 (1971), aff'd 32 N.Y.2d 660, 343 N.Y.S.2d 131, 295 N.E.2d 797 (1973).

Board of Education v. Lakeland Federation of Teachers, 74 Misc. 2d 430, 345 N.Y.S.2d 297 (1973).

Board of Education of Union Free School District No. 3 of Town of Huntington v. Associated Teachers of Huntington, Inc., 331 N.Y.S.2d 17, 30 N.Y.2d 122, 282 N.E.2d 109 (1972).

Board of Education v. Poughkeepsie Public School Teachers Association, 75 Misc. 2d 931, 349 N.Y.S.2d 47 (1973).

Board of Education v. Shanker, 54 Misc. 2d 941, 283 N.Y.S.2d 548 (1967), aff'd 29 App. Div. 2d 634, 284 N.Y.S.2d 453 (1967).

Board of Education v. Yonkers Federation of Teachers, 373 N.Y.S.2d 164 (1975).

Brentwood Board of Education v. Helsby, 68 Misc. 2d 730, 327 N.Y.S.2d 881 (1971).

Candor Central School District v. Candor Teachers Association, 384 N.Y.S.2d 217 (1976).

Carmel Central School District v. Carmel Teachers Association, 76 Misc. 2d 63, 348 N.Y.S.2d 665 (1973).

Caso v. Coffey, 83 Misc. 2d 614, 372 N.Y.S.2d 892 (1975).

Central School District No. 2 of Town of Rockland, et al., Sullivan County, Hardenburgh, Ulster County (Livingston Manor School District) v. Livingston Manor Teachers Association, 355 N.Y.S.2d 834 (1974).

Cohoes City School District v. Cohoes Teachers Association, 50 App. Div. 2d 24, 376 N.Y.S.2d 672 (1975), cert. denied --U.S.--, 96 S.Ct. 1510 (1976).

Currie v. Bixby, 40 App. Div. 2d 341, 340 N.Y.S.2d 73 (1973).

Doering, Impasse Issues in Teacher Disputes Submitted to Fact Finding in New York, 27 Arb. J. 1 (March 1972).

Farrigan v. Helsby, 42 App. Div. 2d 265, 346 N.Y.S.2d 39 (1973).

Greenburgh No. 11 Federation of Teachers v. Helsby, 41 App. Div. 2d 329, 342 N.Y.S.2d 588 (1973).

Helsby v. Board of Education, 59 Misc. 2d 943, 301 N.Y.S.2d 383 (1969), aff'd 34 App. Div. 2d 361, 312 N.Y.S.2d 355 (1970).

Helsby v. Board of Education, 60 Misc. 2d 892, 304 N.Y.S.2d 236 (1969).

Kuntz v. Newburgh Teachers Association, 75 Misc. 2d 389, 347 N.Y.S.2d 905 (1973).

Lezette v. Board of Education, 35 N.Y.2d 272, 360 N.Y.S.2d 869, 319 N.E.2d 189 (1974).

McCarthy v. Board of Education of Union Free School District No. 3, Town of Huntington, 340 N.Y.S.2d 679, 73 Misc. 2d 225 (1973).

Menard, May Tenure Rights of Faculty be Bargained Away?, 2 J. of College and Univ. L. 256 (Spring 1975).

Morris Central School District Board of Education v. Morris Education Association, 388 N.Y.S.2d 371 (1976).

North Bellmore Teachers Association v. Board of Education, 68 Misc. 2d 238, 326 N.Y.S.2d 571 (1971).

Port Jervis City School District v. New York State Public Employment Relations Board, 68 Misc. 2d 1065, 328 N.Y.S.2d 760 (1972).

Public Employees' Fair Employment Act of the Civil Service Law (The Taylor Act), N.Y.C.L.S. art. XIV, §§200-214 (1975).

Reese v. Lombard, 366 N.Y.S.2d 493 (1975).

Romulus Central School Faculty Association v. Romulus Central School District Board of Education, 77 Misc. 2d 1073, 355 N.Y.S.2d 304 (1974).

Schwab v. Bowen, 363 N.Y.S.2d 434 (1975).

Spencerport Central School District v. Spencerport Teachers Association, 374 N.Y.S.2d 488 (1975).

Tuller v. Central School District, 73 Misc. 2d 1028, 343 N.Y.S.2d 467 (1973).

Vamvakis v. Board of Education, 61 Misc. 2d 379, 305 N.Y.S.2d 544 (1969).

Wappingers Central School District v. Wappingers Congress of Teachers, 380 N.Y.S.2d 54 (1976).

Wollett, Labor Relations and Negotiations in the Public Schools, 83 Practicing Law Institute 43 (1976).

Zeluck v. Board of Education, 62 Misc. 2d 274, 307 N.Y.S.2d 329 (1970), aff'd 36 App. Div. 2d 615, 319 N.Y.S.2d 409 (1971).